



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

nity in issuing process, if the possible disobedience of the executive is based upon a legal right. In a British colony, the inability to levy execution on the person of governor during incumbency has not prevented an adjudication on an individual's right against him.¹² And in this country there seems to be no reason why the law should be otherwise; for it does not follow from the constitutional division of powers that the chief magistrate is given the final determination of his private rights and duties.¹³

The legislative department must, of course, be given final determination of legislative questions.¹⁴ Its members are expressly or impliedly privileged from arrest during session, except for treason, felony, or breach of the peace.¹⁵ But their temporary immunity from bodily coercion should not prevent the courts from taking jurisdiction of their personal acts.¹⁶ The performance even of special ministerial duties imposed upon members of state legislatures has been ordered by the court in mandamus proceedings.¹⁷ And in a recent District of Columbia case the court took such jurisdiction over members of a committee of Congress. *Valley Paper Co. v. Smoot et al.*, 38 Wash. L. R. 170 (D. C., Sup. Ct., Feb. 28, 1910). Both the state and federal cases would seem, on principle, to be correct. For the fact that a constitution has conferred the legislative power on a body of men, does not prove that it has entrusted to them individually, or as members of a committee, the final determination of the facts and law involved in the performance of a ministerial act.

FIRE INSURANCE ON PROPERTY USED IN AN ILLEGAL BUSINESS. — A contract to indemnify a lawbreaker for loss which the law imposes as a consequence of his wrongdoing is clearly unenforceable.¹ Insurance against fine or forfeiture for selling liquor without a license would be such a contract, and must be distinguished from insurance against the accidental destruction by fire of property used in the business. It also seems clear that the law should not enforce a fire insurance policy containing a warranty that the property is used for an illegal purpose. But a mere statement in the policy that the property is so to be used may be construed as a permission of such use, rather than a warranty that it shall be so used.

Where the peril is not imposed by law and the contract does not require the illegal use, a more difficult question is presented. On the one hand, when the whole of the property insured is intended to be the immediate

¹² *Hill v. Bigge & Rundell*, 3 Moo. P. C. 465.

¹³ See *Mauran v. Smith*, Governor, 8 R. I. 192; State *ex rel.* *Bisbee v. Drew*, Governor, 17 Fla. 67.

¹⁴ *Ex parte Echols*, 39 Ala. 698.

¹⁵ U. S. CONST., Art. I, sec 6; *In re Armstrong*, (1892) 1 Q. B. 327. See State *ex rel.* *Benton v. Elder*, 31 Neb. 169. In England this privilege has been held not to prevent imprisonment for a criminal contempt of court. *Wellesly's Case*, 2 Russ. & M. 639.

¹⁶ This follows *a fortiori* from the decisions cited in notes 11, 12, and 17. Doubtless their own decision that their legislative duties require their presence elsewhere is a sufficient excuse for their non-appearance in court.

¹⁷ *Attorney General v. Taggart*, 66 N. H. 362; *Ex parte Pickett*, 24 Ala. 91; State *ex rel.* *v. Elder*, *supra*. See *People ex rel. Broderick v. Morton*, 156 N. Y. 136.

¹ Insurance against capture of a ship on an illegal voyage is such a contract. *Potts v. Bell*, 8 T. R. 548.

subject of illegal transactions — for example, insurance on a stock of liquor to be sold without a license² — the contract is against public policy. It may be objected that this is punishing a crime without the usual safeguards of criminal trials, and that it confers a wholly undeserved benefit on the defendant. But to deny the right to enforce an insurance contract of this sort tends to deter the promotion of such kinds of business, while a contrary policy would indirectly encourage the very thing forbidden by the law. On the other hand, when the property is only remotely connected with the illegal transaction, the policy is enforceable.³ The difference between these two classes of contracts is one merely of degree, and the more objectionable the transaction, the further its taint will extend to connected matters. Not unnaturally, therefore, the same state of facts may be regarded as falling on different sides of the line in different jurisdictions.⁴ If the analogy of ordinary contract law were strictly followed, the result would be that even where only a small part of the property was to be the subject of illegal transactions, the entire contract of insurance would be held unenforceable.⁵ Nevertheless, when the question arises, the courts will almost certainly enforce such a contract, at least as to the untainted portion. The policy of protecting the insured would to that extent probably outweigh the policy of indirectly discouraging the illicit traffic.

Permission to make an illegal use is an attempt by the underwriter to waive that form of illegality as a defense. But since illegality is a defense given for the protection not of the underwriter but of the public, illegal use, like the related defense of want of insurable interest,⁶ cannot be waived, a recent Canadian case to the contrary notwithstanding. *Morin v. Anglo-Canadian Fire Ins. Co.*, 12 Western L. R. 387 (Alberta, Trial, Dec. 2, 1909). An attempted waiver makes only more certain the fact that the policy was really intended to protect an illegal business.

Many policies contain an express condition of avoidance in case the property insured is used for unlawful purposes. The violation of this condition at any time during the term of the policy prevents a recovery as to subsequent loss.⁷ In the absence of an express condition, illegality affects the validity of an insurance policy *ab initio* if at all. Hence the fact that the property is actually used illegally is of no consequence, if the illegality was not contemplated at the time of contracting.⁸ Conversely, if the illegality was contemplated at the time of contracting, there can be no recovery, though the illegal use was discontinued before the loss, or had nothing to do with the cause of the fire.⁹

PROOF OF CONTINGENT CLAIMS AGAINST A BANKRUPT ESTATE. — To what extent, if at all, contingent claims may be proved against a bankrupt

² *Kelly v. Home Ins. Co.*, 97 Mass. 288.

³ *Phenix Ins. Co. v. Clay*, 101 Ga. 331.

⁴ Insurance on furniture in a bawdy house is held valid. *Conithan v. Royal Ins. Co.*, 91 Miss. 386. *Contra*, *Bruneau v. Laliberté*, Q. R. 19 C. S. 425.

⁵ See WILLISTON'S, *WALD'S POLLOCK, CONTRACTS*, 483.

⁶ *Agricultural Ins. Co. v. Montague*, 38 Mich. 548.

⁷ *Kelly v. Worcester Mutual Fire Ins. Co.*, 97 Mass. 284.

⁸ *Carrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418; *Erb v. German-American Ins. Co.*, 98 Ia. 606.

⁹ *Lawrence v. National Fire Ins. Co.*, 127 Mass. 557 n.